expenses are paid out of the city treasury is admitted.[1] But although it is doubtless the practice of city councils to pay the expenses incurred by committees in investigating general municipal problems, as well as the fees of experts who aid the local superintendents and engineers, the legal limitations on such expenditures are not adequately determined by the few adjudicated cases. Certainly the fulfillment of a project so studied must lie within the power of the city.[2] And the matter should be one requiring scientific investigation beyond the ordinary knowledge of any city official; for obviously a municipal corporation cannot expend the public funds in educating its officials. To what extent an inquiry may be conducted — whether it may be local only, or may include the study of methods in other municipalities — must be determined by the common-law requirement that all ordinances within the powers of a municipality to enact shall be reasonable.[3] Perhaps the personnel of the committee should be left under this same broad regulation — although here the courts have rendered some assistance in holding that the traveling expenses of a committee consisting of the entire city council, appointed to visit neighboring cities for the investigation of various municipal matters, cannot be paid from the public funds.[4] In general it may be said that if a matter lies within the province of an established city department (fire, water, police, etc.) the head of the department would be the proper person to conduct an investigation at the instance of the city council; otherwise the standing committee of the council would be an appointment which the courts would recognize as reasonable. And outside assistance for the benefit of the departments or committee should take the form of expert advice, bearing the same relation to the knowledge of the department or council that the testimony of an expert does to the knowledge of the jury.[5] Such assistance could have been given in the principal case by the committee of citizens, which was presumably composed of men of broad business knowledge.

It is submitted that the courts, influenced by the political fact that the government of a modern city resembles the management of a large business enterprise, will recognize in municipal corporations an implied power to make reasonable appropriations for purposes such as the one here considered, which are necessary for efficiency in any business corporation, and which are not contrary to any charter requirement that all municipal funds must be expended for the public benefit.

THE DOCTRINE OF MUTUALITY IN SPECIFIC PERFORMANCE. — As a result of the many early exceptions and later qualifications, little now remains of the once recognized rule that to gain specific performance there must have been mutuality of equitable remedy at the time of making the contract.[1] The true principle would seem to be, that equity will not compel

[1] State *v.* Hayes, Mayor, 50 N. J. L. 97.
[2] See Briggs *v.* Mackellar, 2 Abb. Prac. (N. Y.) 30, 58.
[3] Hawes *v.* Chicago, 158 Ill. 653.
[4] James *v.* City of Seattle, 22 Wash. 654.
[5] Lincoln *v.* The Saratoga, etc., Railroad Co., 23 Wend. (N. Y.) 425.

[1] FRY, SPECIFIC PERFORMANCE, 3 ed., 215; Norris *v.* Fox, 45 Fed. 406.

specific performance if, after performing, the defendant's sole security for counter-performance by the plaintiff is a common-law remedy of damages which would be inadequate.[2] But when the damages recoverable at law are the precise *quid pro quo* bargained for, neither actual performance nor an equitable remedy for such performance is essential.[3] The only mutuality in fact necessary is that at the time of the decree the defendant be given or assured performance by the plaintiff or its equivalent, regardless of his lack of reciprocal remedy at the time of the bargain.[4] Thus specific performance may be had by a party who did not sign the memorandum required by the Statute of Frauds;[5] or by an infant, on coming of age, of a contract previously unenforcible by him.[6] Similarly, a vendor, whose inability to make perfect title bars his right to specific performance, may nevertheless be compelled to convey, sometimes with,[7] and sometimes without compensation for the deficiency.[8] And a defendant may be forced to perform his part of an agreement although fraud,[9] laches,[10] or a disregard of his duty as a fiduciary [11] prevents similar relief on his part. In all these instances the defendant receives performance by the plaintiff, fulfilled either voluntarily or as a condition of the decree.

Two other classes of cases are explainable only under the suggested revision of the former rule of mutuality. Specific performance will be decreed even though the plaintiff may, by subsequently exercising an option given by the contract, terminate his liability and leave the defendant without redress;[12] as the defendant in this case receives exactly what he bargained for by the terms of the contract, he cannot be heard to complain. In like manner, negative contracts, which also raised difficulties under the old rule, will be enforced by injunction although equity is without jurisdiction to compel performance of the affirmative side of the contract.[13] Here again the defendant receives his *quid pro quo*, since the injunction is conditioned upon the plaintiff's continuing to carry out his part of the agreement.[14]

Where the plaintiff has fully performed his side of the contract, although

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[2] See 3 COL. L. REV. 1.

[3] Northern Central Ry. Co. *v.* Walworth, 193 Pa. St. 207. See Lamprey *v.* St. Paul & Chicago Ry. Co., 89 Minn. 187, 192. Thus an agreement to lease in return for a later payment of rent could be specifically enforced by the lessee, since damages at law equal in amount to the rent would be the equivalent of performance.

[4] Blanton *v.* Kentucky Distilleries & Warehouse Co., 120 Fed. 318, 350. See Waring *v.* Manchester S. & L. Ry. Co., 7 Hare 482, 492; Blackett *v.* Bates, 1 Ch. App. 117, 124.

[5] Hatton *v.* Gray, 2 Ch. Cas. 164; Clason *v.* Bailey, 14 Johns. (N. Y.) 484; Central Land Co. *v.* Johnston, 95 Va. 223.

[6] Clayton *v.* Ashdown, 9 Vin. Ab. 393. See 40 AM. LAW REG. N. S. 560.

[7] Wilson *v.* Williams, 3 Jur. N. S. 810; Borden *v.* Curtis, 48 N. J. Eq. 120.

[8] Western *v.* Russell, 3 V. & B. 187; Harding *v.* Parshall, 56 Ill. 219.

[9] WILLISTON, WALD'S POLLOCK ON CONTRACTS, 705–707. See Eastern Counties Ry. Co. *v.* Hawkes, 5 H. L. Cas. 331, 365.

[10] Walton *v.* Coulson, 1 McLean (U. S.) 120, 129; 41 AM. LAW REG. N. S. 341–345. See South Eastern R. R. Co. *v.* Knott, 10 Hare 125, 126.

[11] *Ex parte* Lacey, 6 Ves. 625.

[12] Singer, etc. Co. *v.* Union B. & E. Co., 1 Holmes (U. S.) 253; Philadelphia Ball Club, Ltd. *v.* Lajoie, 202 Penn. 210, 219. *Contra*, Ulrey *v.* Keith, 237 Ill. 284.

[13] Lumley *v.* Wagner, 1 De G. M. & G. 604; McCaull *v.* Braham, 16 Fed. 37, and note.

[14] See Stocker *v.* Wedderburn, 3 Kay & J. 393, 404; General Electric Co. *v.* Westinghouse Electric Co., 151 Fed. 664, 672: 20 HARV. L. REV. 57.

not compellable in equity to do so, the true requirements of mutuality have been satisfied so as to entitle him to specific performance.[15] Substantial,[16] and by some courts even part performance,[17] has also been held sufficient. Though perhaps technically incorrect, it is equitable that substantial performance should be enough; but mere part performance should never suffice, since the defendant is not given or assured his equivalent. And the better authority supports this view.[18] In a recent case the plaintiff, having performed for three years his agreement to work certain lots continuously for an eight-year term, was allowed specific performance of the defendant's oral [19] promise to lease the property for that period. *Zelleken* v. *Lynch*, 104 Pac. Rep. 563 (Kansas). The defendant's objection of lack of mutuality was rightly overruled by the court, not because of the part performance, but, as in the negative contract cases, because of the court's ability to assure to the defendant his *quid pro quo* by the form of its decree. For the written lease ordered should rightly contain a clause of reëntry for breach of the covenant to mine continuously, and thus make the defendant's obligation conditional upon the plaintiff's continued performance.

WHO MAY BE A PETITIONING CREDITOR IN BANKRUPTCY. — The right to institute involuntary proceedings in bankruptcy is vested by the Act of 1898 in "creditors who have provable claims." [1] Since a proper petition is necessary to give jurisdiction,[2] the judicial construction of these words is of the first importance. The courts seem generally to give more weight to the intent of the Act to furnish an equitable distribution of a debtor's property among his creditors, than to its literal language.[3] Thus certain provable claims will not qualify any creditor to petition, while the right of a creditor to petition, who has assented to assignments, or is a preferred creditor, is restricted or denied. Although the statute in terms includes all provable claims, the right of the petitioning creditor must have existed as a provable claim at the date of the act of bankruptcy.[4] This excludes

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[15] Boyd *v.* Brown, 47 W. Va. 238; Lane *v.* M. & T. Hardware Co., 121 Ala. 296 (Performance of promise to erect buildings); Topeka Water-Supply Co. *v.* Root, 56 Kans. 187 (Performance of promise to render services); Dresel *v.* Jordan, 104 Mass. 407 (Acquisition of title since time of bargain). For this reason the doctrine of mutuality is inapplicable to unilateral contracts. Howe *v.* Watson, 179 Mass. 30; Spires *v.* Urbohn, 124 Cal. 110.

[16] Howard *v.* Throckmorton, 48 Cal. 482; Thurber *v.* Meves, 119 Cal. 35. *Cf.* Welch *v.* Whelpley, 62 Mich. 15 (Unilateral contract).

[17] University of Des Moines *v.* Polk County H. & J. Co., 87 Ia. 36; Minn. & St. Louis Ry. Co. *v.* Cox, 76 Ia. 306.

[18] Cooper *v.* Pena, 21 Cal. 403; Ikerd *v.* Beavers, 106 Ind. 483; Bourget *v.* Monroe, 58 Mich. 563.

[19] Possession taken by the plaintiff, supplemented by improvements, was sufficient part performance according to the law of the jurisdiction to take the case out of the Statute of Frauds. Bard. *v.* Elston, 31 Kans. 274.

[1] § 59 b.

[2] *Re* Burlington Malting Co., 109 Fed. 777. The sufficiency of the petition is determined as of the date of adjudication. *Re* Mammouth Pine Lumber Co., 109 Fed. 308.

[3] *Re* J. M. Mertens & Co., 147 Fed. 177, 180.

[4] Beers *v.* Hanlin, 99 Fed. 695.